JD(SF)-29-06
East Wenatchee, WA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

BASIN ASPHALT CO., INC.

and Case 19-CA-29850

TEAMSTERS LOCAL UNION 690,
affiliated with INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

Susannah Merritt, Atty., NLRB Region 19
Seattle, WA, for the General Counsel.

Gary E. Lofland, Atty. (Lofland & Associates)
Yakima, WA, for the Respondent.

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the Charging Party.

DECISION

Statement of the Case

WILLIAM L. SCHMIDT Administrative Law Judge. The sole issue presented in this case is whether Basin Asphalt Co., Inc. (Company or Respondent)[1] unlawfully terminated Frank Cunningham, one of its dump truck drivers.

Teamsters Local Union 690 (Local 690 or Charging Party) filed the original charge on June 17, 2005.[2] It amended the charge on August 4, and again on September 16. On October 31, the Regional Director issued a complaint and notice of hearing alleging Respondent violated Section 8(a)(1) and (3) of the Act by: (1) notifying Cunningham that he would not be recalled to work for the 2005 season; (2) failing to recall Cunningham until March 21, and (3) terminating Cunningham on April 15.[3] The Company filed an answer denying that it engaged in the unfair labor practices alleged. On February 10, 2006, the Regional Director issued an amended complaint that, in effect, withdrew all allegations of unlawful conduct other than that

[1] All case documents are amended to reflect Respondent's correct name as shown in the heading of this decision.

[2] All further dates refer to the 2005 calendar year unless shown otherwise.

[3] Section 8(a)(3) prohibits employers from discriminating against employees in order to encourage or discourage union membership. Section 8(a)(1) bars employers from interfering with, restraining, or coercing employees who exercise their Section 7 rights. Section 7 protects the right of employees to engage in union or other concerted activity.

pertaining to Cunningham's April 15 termination. The Company filed an answer denying that it engaged in the unfair labor practices alleged in the amended complaint.

I heard this case at Wenatchee, Washington, on February 21, 22 and 23, 2006. At the hearing, Cunningham admitted that he had been convicted of several felonies in 1992. However, I erroneously precluded Respondent's counsel from establishing the date of his release from confinement for purposes of Rule 609 of the Federal Rules of Evidence. On April 13, 2006, I conducted a post-hearing telephone conference with the parties in an effort to resolve this issue. During that conference, counsel for the General Counsel represented that Cunningham had been released from confinement on June 19, 1998, and later submitted a letter to that effect. Counsels for Respondent and Charging Party both accepted the General Counsel's representation during the conference. The following day counsel for the General Counsel submitted a representation that a records clerk at the Washington State Prison advised her that Cunningham was released from confinement there on June 9, 1998.[4] In either case, Rule 609 applies in Cunningham's situation and I have considered that fact along with all other factors normally considered in assessing witness credibility.[5]

Having now considered the entire record,[6] and after carefully considering the briefs filed by General Counsel, and Respondent, I make the following

Findings of Fact

I. Alleged Unfair Labor Practices

A. Relevant Facts

Basin Asphalt, a subsidiary of Superior Asphalt and Concrete headquartered in Yakima, Washington, operates primarily as an asphalt paving contractor. The Company maintains

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[4] I have designated my April 11, 2006, "Notice" to counsel about a post-hearing conference as ALJ Exhibit 1, and counsel for General Counsel's letters dated April 13 and 14 as ALJ Exhibits 2(a) and (b), respectively. Those exhibits are hereby admitted into the record here.

[5] In addition to my observation of the demeanor of the witnesses and Cunningham's felony convictions, my credibility resolutions have been based on the weight of evidence, established or omitted facts, the apparent probabilities, and reasonable inferences drawn from the record as a whole. In certain instances below, I have detailed further considerations which have led to my specific credibility resolutions. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or reliable documents, or because it was inherently incredible and unworthy of belief.

[6] On November 16, the Acting Regional Director issued a Report and Recommendation on Objections and Challenged Ballots in Case 19-RC-14616, and consolidated that representation matter with this case for hearing. On February 10, 2006, the Regional Director issued a Supplemental Report on Objections and Challenged Ballots that effectively resolved the challenged ballot issues and approved the Union's request to withdraw all pending objections save for that pertaining to Cunningham's termination. The Union requested to withdraw the Cunningham objection on March 31. The Regional Director referred that request to me for consideration and ruling. I approved it on April 14, severed the two cases, and remanded Case 19-RC-14616 to the Regional Director for further appropriate action. I have designated my order approving withdrawal of objection and severing cases as ALJ Exhibit 3 and it is hereby entered in the record.

offices and yards in East Wenatchee, Moses Lake, and Omak, Washington.[7] A manager at each location oversees operations originating under his supervision. Michael Milliken is the general manager at East Wenatchee, the facility where Cunningham worked. The other East Wenatchee managers include Mike Scaman, the general superintendent, David Tait, the paving superintendent; and Willie Ohler, the shop superintendent.

The Company employs asphalt plant operators, dump-truck drivers, road-preparation crews, paving crews, and equipment maintenance mechanics. However, workers from the one location occasionally receive assignments on projects originating at other offices. At the height of the 2005 season, Basin employed about 90 workers at East Wenatchee.

Weather conditions in central and eastern Washington preclude year around operations. Typically, the paving season commences between late February and early April, and ends around Thanksgiving. The Company lays off the employees associated with the paving work when the season ends. At the start of the next season, the Company ordinarily recalls workers based on the skills required to start operations. Although dump truck drivers (such as Cunningham) usually are not the first employees recalled, when the need arises they are typically recalled in order of their seniority with the Company. By the start of the 2005 season, Cunningham, initially hired for the 1999 season ranked as the third most senior driver.

In a typical asphalt resurfacing operation, the preparation crew grinds the top layer of asphalt off with a large grinding designed for that task. Dump truck drivers haul away the grindings to a location designated for recycling. After cleaning the surface, special oil is applied to aid bonding between the old surface and the new asphalt. Thereafter, the paving crew lays the fresh asphalt manufactured at one of the Company's yards or at a nearby portable plant and transported to the on-site paving machine in dump trucks. A large rolling machine compacts and smoothes the freshly-laid asphalt.[8]

Fresh asphalt consists largely of oil, rock, and a hardening agent mixture. The asphalt compound varies from project to project depending on job specifications. Regardless, asphalt emerges from the mixing silo at a very high temperature. Without a suitable release agent, fresh asphalt has a tendency to stick to the sides and bed of the dump trucks during transport. Indeed, some of the more "exotic" oils used become very sticky. If the release agent fails, considerable difficulties ensue which threaten the continuity of the paving process. For example, asphalt compounds have been known to become so sticky as to require a front-end loader to scrape it from the dump truck into the paver's hopper. Even fresh grindings, which are often very hot when loaded into a truck, tend to stick without the application of a release agent.

A detergent solution supplied at the Company's loading locations is the most inexpensive and environmentally-friendly product available. The Company's sprayer devices mix an appropriate amount of concentrated detergent with water. However, weather conditions and the inexplicably poor maintenance of the sprayers cause repeated problems with the use of

[7] Respondent is a Washington corporation. In the 12-period preceding the issuance of the Amended Complaint, it purchased goods and materials valued in excess of $50,000 directly from sources outside the State of Washington or from sources within that state which had obtained them directly from sources outside the State of Washington. I find that Respondent meets the Board's discretionary standard for exercising its statutory jurisdiction and that it would effectuate the Act for the Board to exercise its jurisdiction to resolve this dispute.

[8] Presumably, other workers paint markings on the fresh surface but these persons never factored into the evidence presented here.

detergent. And in chilly conditions the detergent becomes entirely ineffective for its intended use. In addition, if asphalt begins to build in the corners of a truck bed despite the use of the detergent solution, the driver must engage in a time-consuming process of loosening and removing it with a pry bar and a shovel in order to prevent an even further build up. In addition, drivers frequently encounter problems with the mechanical operation of the detergent sprayers.

Trucks carrying asphalt must run at regular intervals from the plant to the paver so that the paver can operate continuously. However, when drivers encounter problems with the detergent or the detergent sprayers, Company managers, such as paving superintendent Tait, have arranged for the drivers to use sprayers filled with No. 2 diesel fuel as a substitute release agent. Diesel fuel works under all conditions. It also has the added advantage from the drivers' point of view because it emulsifies hardened asphalt that accumulates in the truck bed so it can be removed without the more difficult, time-consuming process of chiseling it out.

However, the Washington Department of Ecology bars or at least discourages the use of diesel and can reject a load of asphalt if too much diesel is used as a release agent. In addition, that agency requires that all diesel spills of five gallons or more be reported and cleaned up. The failure to follow the state's established rules about the use of diesel fuel can result in the imposition of hefty fines.

Regardless, the drivers strongly prefer diesel fuel because it works in all weather conditions, its availability does not suffer from the vagaries frequently encountered with the detergent sprayers, and it works better than detergent for the more difficult, time-consuming tasks they performed. Hence, almost all, if not all, drivers carried their own supply of diesel fuel along with a quart or half-gallon spray bottle which they utilize primarily on their tailgate latches.[9] Because of its noxious odor, most drivers wedged their diesel sprayers and their extra diesel supplies between their truck's fuel tanks and the truck chassis rather than inside the cab. In that location, neither the sprayer nor the extra storage bottle would be visible except from a very close distance.

At the end of the day on October 11, 2004, a relatively new driver pulled up to the refueling station in the East Wenatchee yard to refill his fuel tanks. The driver also sprayed a few gallons of diesel fuel in the truck bed presumably to emulsify some hardened asphalt. When the truck bed was later raised for washing, the fuel ran out on to the ground requiring a clean up by the yard crew.[10]

The following morning a notice appeared at the time clock bulletin board barring drivers from further use of diesel. The Company distributed another notice over the names of Milliken, Ohler, and Scaman in the pay envelopes at the end of the week. This notice stated that effective "10/12/2004, there will be no more diesel sprayers, containers with diesel in them, or any diesel of any kind used on any trucks or pickups or carried in them." This notice also barred employees from taking the paving and prep crew rigs home at night, and required drivers to keep their trucks free of trash. In addition, it stated that Ohler or Scaman would conduct a weekly inspection regarding all items addressed in the memo "to make sure all equipment is kept in clean and orderly manner."

[9] Tailgate latches pose a special problem. If not adequately cleaned, the tailgate will not close properly and, if that occurs, the likely result will be product spillage during transport.

[10] The Company disciplined the driver involved for the spill but the nature of the discipline is not known. However, no evidence suggests that the driver was terminated.

Before the 2004 season ended, Scaman gave Cunningham a written warning after a shop mechanic discovered a bottle or a sprayer filled with diesel fuel stashed behind his truck's regular fuel tank while doing some routine truck maintenance. When he received the warning, Cunningham protested the warning saying that he only had a spray bottle for use on his tailgate. Scaman told Cunningham that he knew the drivers need to do that but that they could not have diesel around the yard area. He told Cunningham that if they needed to use diesel they should do it out on the job site away from the yard.[11]

Meanwhile, Cunningham and other employees initiated a variety of protected activities. The first activity occurred in August 2003 when Cunningham and 10 other employees filed a lawsuit against Basin, its parent company, and other related companies in state court claiming that the defendant companies failed to pay the proper wage and overtime rates on prevailing wage jobs. By the time of this hearing, that case remained unresolved. In addition, Cunningham filed a complaint with the U.S. Department of Labor for a similar reason but that matter had been rejected by the time of the hearing. Milliken professed to know nothing of the state court lawsuit until he became aware of it at this hearing.

Cunningham also filed complaint in May 2004 with the Washington Department of Labor and Industries alleging that Basin failed to pay about 16 employees for standby time on a rainy day. That complaint resulted in a subsequent payment to the employees in settlement of the issue. Although Milliken claimed that he never saw that written complaint itself, he conceded that Diane Miller, the East Wenatchee payroll clerk at the time, told him about it, and that he knew Cunningham initiated it.

In addition, Cunningham complained (apparently verbally) to the Washington Highway Patrol at some time during the 2004 season about the requirement that drivers maintain log books. This complaint resulted in an audit of Basin's log books by the Highway Patrol and a threatened limitation in the length of time the drivers could operate their trucks each day. While this matter was pending, paving superintendent Tait told driver Jack Hatmaker that a situation going on at the time could affect the length of daily driving time. Tait also told Hatmaker that the limitation would be a "real issue" during the rest of the year because they would have "some real problems doing what we used to do." He also disclosed to Hatmaker his belief that

Cunningham initiated the complaint and added that "this should have never come to this."[12] However, this matter appears to have been resolved with only minor changes in the Company's record keeping procedures.

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[11] Scaman contradicted this account by Cunningham. I do not credit Scaman as I find Cunningham's version more probable for several reasons. First, when this subject initially arose in Scaman's testimony, he explained the diesel ban by reference solely to the cleanup problems at the Company's newly leased Baker Flats yard in East Wenatchee. Second, Scaman's implied claim that the October 12 memo banned the use of diesel altogether flies in the face of the widespread continued use of diesel by all drivers. And third, Respondent adduced no evidence that Scaman or Ohler ever conducted any inspection referred to in the October 12 memo to uncover the drivers' stashes of diesel fuel. Had they conducted the threatened inspections, it would have been obvious that all drivers carried sprayers filled with diesel fuel.

[12] Tait denied this conversation occurred. However, I credit Hatmaker's testimony based on his calm and forthright appearance while testifying. By contrast, I found Tait's demeanor far less straightforward and candid, particularly when questioned about employee activities. Thus, when asked if he had any suspicions that Cunningham was involved in union activity, Tait responded, "Not really." I found his manner and tone in this response entirely unconvincing.

During the 2003 season, Cunningham contacted a Teamster Union local in Wenatchee to discuss organizing the Company's drivers. Thereafter, he began promoting unionization among drivers at all three Basin locations and soliciting union authorization cards. After he submitted the cards to the union early in the 2004 season, a Teamster international official told Cunningham that the local union in Wenatchee could not organize Basin's employees because it represented primarily long-haul drivers rather than construction drivers. The official referred Cunningham to Local 690 in Spokane which represents construction drivers. Cunningham obtained new authorization cards from Local 690 and began soliciting driver signatures all over again. Although Eric Spanjer also promoted the union and got some cards signed, employees viewed Cunningham as the leading union advocate.

Cunningham made no attempt to hide his union activities. Admittedly, no management official ever spoke to him about his union sympathies. Spanjer, on the other hand, spoke to Scaman about the organizing effort. Scaman claims that Spanjer offered to defeat the union if he received a pay increase.

On December 1, 2004, Local 690 filed an election petition in Case 19-RC-14616 seeking to represent Basin's drivers.[13] Milliken learned of the union organizing a few days before receiving a letter the Union sent to the Company just before filing the election petition. He had heard rumors that Cunningham had been involved in the union organizing or leading it. In addition, Scaman said there was "scuttlebutt" that Cunningham supported the union.

Most, if not all, employees were on layoff by the time the Regional Director approved a Stipulated Election Agreement (Stip) entered into by the Basin and Local 690 on December 10 that provided for an election in the following unit:

> All full-time and regular part-time on and off road truck drivers and water truck drivers employed by Basin Asphalt out of its facilities in East Wenatchee, Omak and Moses Lake, Washington, excluding all other employees, operators, laborers, confidential employees, mechanics, managerial employees, clerical employees, guards and supervisors as defined in the Act.

For that reason, the parties agreed to hold the election on May 25, 2005, when the complement of unit employees would be at or near its seasonal peak.[14]

By the start of the 2005 season, Cunningham was the third most senior driver at East Wenatchee. Admittedly, both the 2004 and 2005 seasons were extremely busy. In mid-February, the Company placed a classified ad in *The Wenatchee World*, the local paper, seeking dump truck drivers and other tradesmen at East Wenatchee and Omak.

In preparation for the 2005 season, Scaman interviewed applicants and began calling laid off employees back to work. For his part, Milliken professed to be preoccupied with bidding upcoming work and was not involved in the hiring process. Regardless, Milliken claims that Mike Burns, the corporate safety coordinator at Basin's parent company in Yakima, telephoned

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[13] Respondent attached the petition in 19-RC-14616 to its post-hearing brief. I take notice of that document pursuant to Rule 201 of the Federal Rules of Evidence.

[14] During Milliken's cross-examination, counsel for the General Counsel asserted that the unit included operators and laborers. The acting Regional Director's post-election report (GC Exhibit 1(j)) clearly shows otherwise.

him with instructions that drivers Mike McCarty and Cunningham should not be recalled for the 2005 season "for safety reasons."[15] Purportedly, McCarty struck a bridge abutment during the prior season and a brouhaha subsequently developed between the Company and the state over posting a bond to cover the cost of repairs to a crack that appeared in the bridge structure. No explanation was provided as to why Burns supposedly viewed Cunningham as a safety risk. Without questioning Burns' purported directive, Milliken claimed that he instructed Scaman and Tait to notify the two drivers that they would not be recalled.

Scaman promptly telephoned Cunningham and told him he would not be recalled to work that season.[16] Although Scaman told Cunningham that the directive originated with Mike Burns, he professed his disagreement with the decision but claimed that there was nothing he could do because the order "came down from Corporate." At Cunningham's request, Scaman provided Burns' telephone number.

Cunningham telephoned Burns seeking an explanation. Burns told him that he would not be recalled because of "economic reasons," the Company did not have enough work and had to cut back. In view of that claim Cunningham asked Burns to explain why the Company had been advertising for drivers. Eventually, Burns told Cunningham that Milliken had made the decision that he would not be recalled.[17]

That evening Cunningham telephoned Superintendent Tait and quizzed him about why he would not be recalled. Tait said he did not know the reason. When Cunningham asked if the reason was related to the lawsuits he had filed or his union activities, Tait continued to profess that he did not know the reason.[18]

The following day Scaman telephoned Cunningham to advise that a mistake had been made and that he would be called back to work for the 2005 season after all. Although Scaman still asserted to Cunningham that he did not know what had happened, Milliken claims that he made the decision to recall Cunningham after Scaman and Tait protested Burns' interference with their prerogatives and urged that Cunningham be recalled because he had been a very good driver. Milliken purportedly talked the matter over with Respondent's labor counsel and concluded also Cunningham should be recalled so he directed Scaman to recall him.

Cunningham returned to work on March 21 but he was soon let go.[19] When he initially notified Cunningham of his discharge on April 15, Milliken relied on three recent events,

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[15] Respondent denied the complaint allegation that Burns was a supervisor and agent. Although I find the evidence insufficient to show that Burns was a supervisor, it shows that he clearly was an agent within the meaning of Section 2(13) at relevant times. Burns regularly conducts mandatory safety meetings and Scaman admitted that he does what Burns says.

[16] It is undisputed that Scaman called Cunningham over a speakerphone from his vehicle and that Tait was present with Scaman at the time.

[17] As Burns did not testify, I credit Cunningham's uncontradicted account of this exchange.

[18] Tait denied that Cunningham ever informed him that he supported unionization. He also denied that Cunningham telephoned him at home on this occasion. I do not believe Tait's claim that he lacked any knowledge of Cunningham's union sympathies or other protected activities. I found his convoluted claim that he would not have taken Cunningham's call during the evening hours entirely self-serving, particularly in view of Tait's participation in the call by Scaman to Cunningham earlier in the day.

[19] When Scaman notified Cunningham that he would be recalled for the 2005 season, he asked for and received a two week postponement to finish up an interim job hauling produce.

Cunningham's use of a Company truck for a personal errand, a remark over the drivers' CB radio network critical of management, and using diesel fuel as a release agent.

Unlike the situation with the crew rigs before October 12, 2004, the Company almost always required the dump trucks to be parked overnight at the Company's yard unless the drivers needed to stay out of town overnight. When that occurred, the Company permitted drivers to take their trucks where necessary for meals and lodging. In addition, it permitted drivers to made brief stops at convenience stores along their ordinary routes during the workday for soda, food, and other sundries. However, the Company purportedly expected drivers to seek prior a supervisor's prior approval before taking an assigned truck off route on any personal errand.

At the end of his workday on Friday, March 25, Cunningham admittedly took a detour on his way back to the Baker Flats yard in order to stop at the URM wholesale store in Wenatchee to purchase a case of hot dogs for his father's church picnic the next day. Cunningham said that when he approached the bridge crossing over the Columbia River to Wenatchee from the south he decided to cross over to the URM store so he could get there before it closed. He estimated that he traveled about a mile to a mile and a half round trip on this detour. Scaman saw Cunningham in Wenatchee that evening. Although he would have had no way of knowing Cunningham's route, Scaman estimated that his detour would have been about four miles.

The following Monday Scaman asked Cunningham what he had been doing in downtown Wenatchee on Friday evening. Cunningham explained about the side trip to the URM for his father's hot dogs. Cunningham told Scaman that he was not on Company time and asked Scaman if there was any problem with what he had done. Scaman told him it was not a big deal but he wanted to be contacted "in case . . . something like that happens."[20]

Later that day, Scaman prepared a disciplinary corrective action form citing Cunningham for "using Company equipment for personal business" the previous Friday. In addition he prepared a second corrective action form for Spanjer accusing him of "Falsification of time card or Company Records" by putting "more hours on (his) time card than worked."[21] As both men worked on a paving job in Chelan, Washington, supervised by Tait, Scaman asked Tait to have Cunningham and Spanjer sign the forms and return them.

Tait claims he forgot about the forms on Tuesday but he spoke to both men on Wednesday. Cunningham refused to sign the form and protested that Scaman told him earlier that the detour was "no big deal." In any event, Tait claims that Cunningham kept the form. Purportedly, he later told Scaman that but Scaman never spoke further to Cunningham concerning the form. Spanjer also refused to sign the form presented to him. After he read it, he admittedly became angry, tore the form in half, and gave it back to Tait commenting that he could tell "Mike Scaman he can stick this form up his ass." Although Tait returned Spanjer's

[20] I base the finding in this paragraph on Cunningham's testimony. I do not credit Scaman's claim that he told Cunningham on Monday that the detour was a "big deal." Cunningham's account of Scaman's reaction to his detour when the two met on Monday morning is consistent with Scaman's reaction to a detour taken by Eric Spanjer for a package of cigarettes two or three months later. In addition, I find Cunningham's account is consistent with his surprise and protest when Tait later presented him with a disciplinary form for signature.

[21] The drivers self-certify their time cards. Spanjer's discipline suggests that Scaman accepted Cunningham's claim that he made the hot dog detour on his own time.

form to Scaman and told him what had happened, neither Scaman nor any other manager ever spoke to Spanjer about his refusal to sign the form or his hostile reaction to it.

Basin Asphalt equips all of its trucks with a FM receiver and transmitter. However, the drivers all carry their own personal CB radios so they can talk with each other regularly without causing unnecessary traffic on the Company's FM system. Seemingly, the driver's CB radios become essential for work communication around the Company's portable asphalt plants because Company's FM radio interferes with the plant electronics. Apart from that, the CB radios provide the drivers with a means of engaging in "shop floor" talk. Drivers can be heard critizing their managers and supervisors on a daily basis about all types of work related matters, including pay, hours, lack of equipment repairs, and poor scheduling. Managers rarely use or monitor the CB network and no drivers other than Cunningham have ever been disciplined for comments routinely spoken over the CB band.

At the end of his work day on April 8, Cunningham learned from Tait that the Company needed pilot cars to move a wide loader to NC Machinery, a nearby Caterpillar dealer, for repairs and that they were having difficulty arranging this service because several office workers had recently quit. As Cunningham's sister owned a firm that provided pilot car services, he quickly arranged for the pilot cars but he could not arrange for the required state permit before the office that issues them closed for the weekend. After he left the job site to drive home in his own pickup, Cunningham spoke with some other drivers over the CB network about transporting the disabled loader and admittedly commented that "they (meaning the management) cannot even get their act together to get this kind of stuff done."

Meanwhile, maintenance superintendent Ohler had traveled to the jobsite with a mechanic from NC Machinery to do some tests on the loader. While the two men were in the cab of the loader, Ohler overheard Cunningham's comments on a CB radio that had been left in the loader. Among other things, Ohler overheard Cunningham say that management even did not know how to set up the pilot car service and that they did not know what they were doing. As Ohler found the Cunningham's comments embarrassing in front of the outside mechanic, he turned the volume on CB radio down.

The following Monday Ohler spoke to Milliken about the loader problem and told him about Cunningham's comment. Milliken asked Ohler to prepare a note about it and promised Ohler that he would deal with it. Later that day Ohler turned a note over to Milliken. The note states only that Ohler had been embarrassed by a "negative comment" Cunningham made over the CB radio which he overheard in the loader cab with the NC Machinery mechanic. Admittedly, Milliken did nothing further about the matter until he terminated Cunningham at the end of the week.

On Wednesday, April 13 the first driver loaded with asphalt on the Chalen job reported back over the CB network to the other drivers that the asphalt was particularly sticky. When Jack Hatmaker, the next in line to load, heard that report, he filled a plastic bucket (described as a large butter tub) with diesel fuel and splashed it around his truck bed to prevent the asphalt from sticking. While doing so, Hatmaker noticed Milliken standing on a hill overlooking "pit" where a portable asphalt plant was located. Cunningham, next in line immediately behind Hatmaker, did the same thing.

Milliken saw Cunningham putting diesel fuel on his truck bed from his vantage point 200 feet or so away. So did Don Davis, the plants manager for Superior Asphalt and Concrete, located at the time in the control house of the portable asphalt plant also about 200 feet away. Ostensibly, Milliken called Davis and requested that he speak to Cunningham about using

diesel on the truck bed.[22] Davis did speak to Cunningham when he returned later in the day for another load of asphalt. He told Cunningham not to use diesel again and Cunningham agreed to abide by Davis' directive. Milliken purportedly returned to his office and began mulling over Cunningham's recent conduct.

On April 15, Tait told Cunningham that Milliken wanted him to stop at the office before he went home. When he arrived at the office, Milliken invited Cunningham along with Scaman to his office. Supposedly, Milliken had prepared a list of three items which he cited to Cunningham as reasons for terminating him. As previously noted, these three items were: (1) the use of a Company dump truck for a personal errand; (2) negative comments about the Company over on the CB radio; and (3) using a bucket full of diesel fuel on his truck bed. Cunningham agitated Milliken by quibbling over the significance of each item. Finally, according to Cunningham, Milliken told him that he "was tired of the shit [he] had been stirring up and that [he was] no longer an employee of the Company." Milliken denied making such a statement.[23] Cunningham asked for a written statement regarding his termination and Milliken provided a letter that stated simply that his employment with Basin "is hereby terminated effective April 15." GC Exhibit 6.

A couple of weeks later, Cunningham wrote to Milliken asking to be provided with a written reason for his discharge. GC Exhibit 7. Milliken responded by a letter dated April 28. In it, Milliken reminded Cunningham that employment at Basin was "at-will" and that he had been terminated because he: (1) stored diesel fuel on his truck; (2) used the Company's truck for a personal errand; (3) he refused to sign a warning; (4) made negative comments about the Company on work time over the radio; and (5) used diesel fuel to "wash the truck bed." Milliken concluded the letter by saying that "[t]his pattern of conduct and behavior lead to the conclusion that it was not in the best interest of the company to continue your employment." GC Exhibit 8. When Milliken terminated Cunningham on April 15, he never mentioned the 2004 warning about carrying diesel on his truck or his refusal to sign the warning. Regardless, Milliken felt any one of the items cited in his April 28 letter constituted a sufficient basis for terminating an employee.

About a month after Cunningham's termination, Eric Spanjer gave some cash to Scaman to purchase a package of cigarettes for him because he was too busy to go to the store himself. When Scaman failed to return with the cigarettes after a couple of hours, Spanjer took a side trip in his truck to get the cigarettes himself. When he came out of the store, Scaman was sitting next to his truck. Mindful that Cunningham's side trip had been one of the reasons cited for his termination, Spanjer asked Scaman if he was going to get in trouble for stopping at the store. Scaman told him that he would not. Drivers frequently stop on route to purchase a variety of personal items or to use a restroom, and occasionally use Company trucks to run errands for soft drinks and ice after work.

The Company disciplined another driver in July 2002 for taking a Company vehicle equipped with a blade and roller home to use on his orchard over the weekend without prior authorization. When he returned the truck the roller had been damaged and was unusable. That employee received a written warning for the offense.

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[22] Davis made no mention in his testimony of a call or any other contact from Milliken about Cunningham using diesel fuel on this occasion.

[23] Although counsel for the General Counsel notes this alleged remark by Milliken, no argument has been fashioned from it. As I find the remark somewhat ambiguous, I find it unnecessary to resolve the credibility issue presented by the differing accounts.

Respondent offered evidence about the termination of other employees subsequent to Cunningham. Thus, in early May 2005, Scaman terminated a relatively new driver because he locked up the wheels of his pup trailer for several hundred yards. As a result the tires were worn down on one side and ruined. Another driver was terminated in early June 2005 for using abusive language to the office staff at corporate headquarters in Yakima. Two other employees were terminated for causing considerable damage to Company trucks.

The Company's campaign against the Union began in earnest following Cunningham's termination. Basin's labor consultant, Bill Price, held a series of mandatory meetings where he spoke to employees about the effect of unionization and the import of the upcoming election. At the final meeting, Company president Brian Sims told employees emphatically that he was opposed to unionization and that he would not sign the union agreement he purported to be holding in his hand at the time.[24] The Company also began distributing leaflets with employee pay checks aimed at convincing them that they should vote against union representation.[25]

B. Further Findings and Conclusions

An employer "may discharge an employee for good cause, bad cause, or no cause at all, without violating Section 8(a)(3), as long as his motivation is not antiunion discrimination and the discharge does not punish activities protected by the Act." *L'eggs Products v. NLRB*, 619 F.2d 1337, 1341 (9th Cir. 1980). Accordingly, in cases of this type the General Counsel must prove that the employee's termination resulted from an unlawful motivation. *NLRB v. Klaue*, 523 F.2d 410, 413 (9th Cir. 1975).

The Board established an analytical framework for cases which turn on motive in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982). The *Wright Line* test requires the General Counsel to initially "persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision." *Manno Electric*, 321 NLRB 278, 280, fn. 12. See also *Healthcare Employees Union v. NLRB*, 441 F.3d 670, 680 (9th Cir. 2006) ("Under *Wright Line* the Board requires the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision.") The General Counsel's burden requires proof by a preponderance of the evidence that (1) the employee engaged in protected activity; (2) the employer knew about, or suspected, that the employee had engaged in protected activity; 3) the employee suffered an adverse employment action; and (4) a nexus or motivational link exists

[24] Several employees testified attended this meeting. Most agreed that Sims held a document in his hand when he told them he would not sign the union's agreement. Some agreed with the suggestion by Respondent's counsel that Sims referred to the document as Local 690's "master" agreement." However, employee Erick Bradford said Sims stated that "he would not accept any bargain that the union put forth." I do not credit Bradford's recollection.

[25] Counsel for General Counsel offered one such leaflet. Its bold heading, "Collective Bargaining Risks," is followed by this language artfully lifted from the Board's decision in *Coach & Equipment Sales Corp*., 228 NLRB 440 (1977): ". . . collective bargaining is potentially hazardous for employees and . . . as a result of such negotiations employees might possibly wind up with less benefits after unionization than before . . .." The leaflet concludes (again in large bold print) "Why Take the Risk?" Beneath, in even bolder print, is the word "Vote" with an adjacent large box labeled "NO" that contains an emphatic check mark. A second leaflet introduced by General Counsel charges that a "union does not care if the company succeeds or fails" and claims that unions continue taking dues even if a company fails. GC Exhibit 9.

between the protected activity and the adverse employment action. *American Gardens Management Co.,* 338 NLRB 664, 645 (2002). In discrimination cases, the timing of an adverse action may be very significant. *Equitable Resources*, 307 NLRB 730, 731 (1992).

If the General Counsel satisfies the *Wright Line* requirements, then the burden of persuasion shifts to the employer to prove that it would have taken the same action even in the absence of the protected activity. *North Carolina License Plate Agency* #18, 346 NLRB No. 30, slip op. at 1 (2006), citing *Donaldson Bros. Ready Mix, Inc*., 341 NLRB No. 124 (2004). To meet this burden "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Roure Bertrand Dupont, Inc.,* 271 NLRB 443 (1984). But where the affirmative defense presented amounts to a pretext, the employer not only fails to met its *Wright Line* burden, it lends added support for a finding that the adverse action was unlawfully motivated.[26] *Jet Star, Inc. v. NLRB*, 209 F.3d 671, 678 (7th Cir. 2000), and the cases cited there.

The General Counsel argues that the reasons advanced by Respondent for Cunningham's termination are pretextual. Thus, the General Counsel argues that Respondent overlooked similar minor infractions by other employees and signaled its unlawful motive by initially notifying Cunningham that he would not be recalled for the 2005 season due to a lack of work, a patently false reason, following the filing of the representation petition in December 2004. The General Counsel notes that Respondent vigorously opposed unionization in the period just prior to the May 2005 election. Hence, the General Counsel contends, in effect, that the timing of Cunningham's termination only a month before the election was designed to maximize its impact on the outcome.

Respondent argues that the General Counsel failed to prove a prima facie case under *Wright Line.* Although it concedes that Brian Sims openly opposed unionization, Respondent asserts that animus gleaned solely from his lawful statements of opposition is insufficient to prove that required element under *Wright Line*. Respondent also argues that the General Counsel failed to prove that any of Respondent's agents or supervisors knew of Cunningham's union or protected activity. But aside from the deficiencies Respondent perceives in the General Counsel's case, it also avers that Cunningham's termination was amply justified by the "inappropriate conduct and behavior" cited in Milliken's April 28 letter.

Contrary to Respondent's contention concerning the lack of animus, an employer's anti-union campaign, while lawful, should treated as background evidence of anti-union animus. *Healthcare Employees Union*, 441 F.3d 681, citing *Tim Foley Plumbing Service*, 337 NLRB 328 (2001). Here, the evidence surrounding Respondent's anti-union campaign amply demonstrates Respondent's animus toward unionization.

Likewise, Respondent's contention that the General Counsel failed to show Respondent knew about Cunningham's activities also lacks merit. Board precedent holds that it is not necessary for the General Counsel to prove that the employer had specific knowledge of an

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[26] As used by the Board, the term pretext "constitutes a finding that the reasons advanced by the employer either did not exist or were not in fact relied upon." *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799. More literally, pretext ordinarily means an explanation put forward to conceal a true purpose or object, in effect, an ostensible reason. *The Random House Dictionary of the English Language, Unabridged Edition,* New York, Random House, 1983, p. 1141.

employee's interest and activities, where other circumstances support an inference that the employer had suspicions or probable information on the identity of union supporters. *Martech MDI*, 331 NLRB 487, 488 (2000). The evidence shows that Cunningham was the principal union advocate over the course of more than a year. Both Milliken and Scaman admitted they had heard rumors of Cunningham's support for the Union and I credit Cunningham's claim that he questioned Tait in a telephone conversation as to whether his union and other protected activities had anything to do with the decision that he would not be recalled for the 2005 season. Moreover, Milliken knew of Cunningham's role in the complaint over standby time and, despite Milliken's professed lack of knowledge, at least some of Respondent officials knew of his participation in the prevailing wage lawsuit. Hence, I find ample evidence supports an inference that Respondent's agents were well aware of Cunningham's numerous protected activities.

The timing of Cunningham's termination also lends strong support for the General Counsel's case of unlawful motivation. Not only did Respondent terminate Cunningham just before it began its all-out anti-union campaign, it sought initially avoid recalling Cunningham at all for the 2005 season for reasons that were obviously pretextual.[27] An employer's adverse employment action between the filing of an election petition and the election itself, as occurred here, gives rise to a "powerful inference of anti-union animus." *Healthcare Employees Union*, 441 F.3d 682. Accordingly, I find that the General Counsel met the *Wright Line* burden of initially establishing that Cunningham's protected conduct was a motivating factor in Respondent's decision to terminate him.

In my judgment, Respondent's affirmative defenses are unpersuasive and pretextual. Milliken's claim that any of Cunningham's several offenses alone would be sufficient to warrant the termination of an employee reinforces the conclusion that Respondent set its sights on getting rid of Cunningham. Thus, no other driver has ever been terminated for the use of diesel fuel as a release agent and only one other driver ever received discipline for the use of diesel, namely, the driver responsible for the large diesel spill in the Baker Flats yard that led to the October 12 memo. By any measure, that involved an extreme situation. Milliken's suggestion that Cunningham's more judicious use of diesel on April 13 would warrant termination when this earlier incident did not exposes the perfidious character of the claim. Similarly, I find it highly improbable that neither Davis nor Milliken observed Hatmaker's use of diesel immediately before Cunningham's offense. The fact that neither man admonished Hatmaker strongly indicates the pretextual character of Cunningham's termination for this reason. Considerable ancillary evidence about this particular subject reinforces that conclusion. In addition, no explanation exists for Milliken's failure to communicate his displeasure immediately to Cunningham and all other drivers about the use of diesel fuel on the Chalen job by way of the Company's FM radio system, or at the very least within the next two days before he discharged Cunningham. The fact Respondent made no effort to issue a renewed warning about the use of diesel fuel also lends added support for the conclusion that Milliken had seized on this incident solely to get rid of Cunningham. Indeed, despite the gravity with which Respondent's witnesses described the prohibition against the use of diesel fuel, clearly no supervisor and manager made the slightest effort to conduct follow up inspections after the October 12 memo issued or they would have easily discovered the widespread, daily use of diesel fuel by all of the drivers.

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[27] Thus, I find Milliken's claim that Burns directed him not to recall Cunningham because of his poor safety record a complete fabrication especially where, as here, no evidence at all exists to establish any claim that he had a bad safety record. Burns' uncontradicted assertion to Cunningham that he would not be recalled because of a lack of work flies in the face of Milliken and Scaman's description of the heavy workload during the 2005 season and the Respondent's pre-season advertisements for drivers.

In addition, I find Milliken's reliance on Cunningham's critical comment related to the pilot car service and his refusal to sign Scaman-issued disciplinary warning over the hot dog detour extremely unpersuasive. No other employee has ever been disciplined in anyway or even cautioned for any unflattering comments about managers and supervisors that occur over the CB radios on a daily basis, or for refusing to sign a disciplinary warning. No one bothered to even suggest to Cunningham that his conduct regarding these two issues was at all unacceptable until the time of his discharge. By contrast, Spanjer's far more egregious reaction to Scaman's disciplinary notice resulted in no reaction of any kind from management. Moreover, Respondent adduced no evidence that it maintained a policy making it mandatory for employees to sign disciplinary warnings. The fact that Milliken threw both matters in the Cunningham discharge stew without any prior notice to him of management disapproval provides additional support for a conclusion that Respondent's displeasure with Cunningham's rested on some other rationale.

When it occurred, the detour Cunningham took in the Company truck could easily be labeled as Cunningham's most serious offense. However, Respondent can hardly be heard to justify this discharge with this incident for several reasons. First, when a prior unauthorized personal use of Company equipment occurred in 2002, the discipline issued was equal to that Cunningham received even though the employee in the earlier case made use of the equipment for the whole weekend and had returned the vehicle in a damaged and unusable condition. By contrast, Scaman brushed aside Spanjer's use of Company equipment subsequent to Cunningham's discharge for a personal errand without so much as a shrug.

However, Milliken explained that his decision to terminate Cunningham rested on the cumulative effect of several incidents which occurred following Cunningham's recall in 2005. Were it not for the fact that some of the reasons cited to Cunningham were so utterly vacuous because the derelictions applied only to Cunningham, and were it not for the fact that Respondent so badly bungled an earlier effort to avoid recalling Cunningham for the 2005 season, this argument might be susceptible to at least some consideration by the proverbial reasonable person.

However, Respondent's failure to call Burns to substantiate Milliken's explanation for the mix up about recalling Cunningham and the failure to show any basis for impugning Cunningham's safety record undermined my confidence in Milliken's truthfulness. Burn's absence also left uncontradicted Burns' assertion to Cunningham that Milliken made the decision that he would not be recalled. Hence, as the General Counsel argues, this early misstep signaled Respondent's desire to fabricate reasons to rid itself of Cunningham.

Respondent argues that the NLRB should not establish itself as a super personnel agency which assesses the reasonableness of an employer's disciplinary policies. I wholeheartedly agree. However, that plainly is not the basis for my analysis here. Instead, I have merely measured Respondent's disciplinary actions applied to an employee who engaged in considerable protected activity against the disciplinary actions applied to employees who engaged in little or no protected conduct and concluded that the extreme disparity merits the conclusion that the Respondent clearly discriminated against the employee with a long history of protected conduct. If Respondent had shown that it had ever terminated any employee for the minor infractions for which Cunningham was fired, my conclusion would have been quite the opposite. Instead, Respondent's case established that it never terminated employees save for far, far more serious infractions than those cited to Cunningham. Flimsy or false explanations affirmatively suggest that the employer has seized upon a pretext to mask its anti-union motivation. *NLRB v. Dillon Stores*, 643 F.2d 687, 693 (10th Cir. 1981. Here, Respondent's own

evidence supports the conclusion which I have reached that its motive for discharging Cunningham violated the Act.

In sum, I find the reasons advanced by Respondent for terminating Cunningham unpersuasive. They amount to little more than minor infractions Respondent either overlooked entirely or tolerated in other employees. Having concluded that they amount to pretextual reasons for ending Cunningham's employment, I find Respondent failed to meet its *Wright Line* burden. Accordingly, I conclude that Respondent violated Section 8(a)(1) and (3), as alleged.

Conclusions of Law

1. Respondent is an employer engaged in commerce or an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 690 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(3) and (1) by terminating Frank Cunningham on April 15, 2005.

4. Respondent unfair labor practices specified in 3, above, affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Remedy

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist, and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent must offer Frank Cunningham reinstatement to his former position, or if that position no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and benefits, and make him whole for any loss of earnings and other benefits. Backpay should be computed on a quarterly basis from the date of his termination to the date of an appropriate offer of reinstatement, less any net interim earnings, as prescribed in ***F. W. Woolworth Co.***, 90 NLRB 289 (1950), plus interest as provided in ***New Horizons for the Retarded***, 283 NLRB 1173 (1987). Respondent must further expunge from its records any reference to Cunningham's April 15 termination and notify him in writing that such action has been taken and that any evidence related to that termination will not be considered in any future personnel action affecting him. ***Sterling Sugars, Inc.***, 261 NLRB 472 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[28]

[28] If no party files exceptions as provided by Section 102.46 of the Board's Rules and Regulations, the Board, as provided in Section 102.48 of the Rules, will adopt these findings, conclusions, and recommended Order, and all objections to them shall be deemed waived for all purposes. I hereby deny any pending motions inconsistent with this Decision and recommended Order.

ORDER

The Respondent, Basin Asphalt Co., Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Discharging or other wise discriminating against employees because of their protected concerted activities or their activities on behalf of Teamsters Local Union 690.

b. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

a. Within 14 days from the date of this Order, offer Frank Cunningham full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

b. Make Frank Cunningham whole for any loss of earnings and other benefits suffered as a result of his April 15, 2005, termination together with interest as specified in the in the remedy section of this decision.

c. Within 14 days from the date of this Order, remove from its files any reference to the Frank Cunningham's April 15, 2005, termination, and within 3 days thereafter notify him in writing that this has been done and that his April 15 termination will not be used against him in any way.

d. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the backpay due under the terms of this Order.

e. Within 14 days after service by the Region, post at its office and place of business in East Wenatchee, Washington, copies of the attached notice marked "Appendix." If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD." Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or ceased its operations at East Wenatchee, Washington, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 15, 2005.

f. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated:

_____
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discriminate against our employees because of their protected concerted activities or their activities on behalf of Teamsters Local Union 690.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce you because you exercise rights guaranteed by Section 7.

WE WILL, within 14 days from the date of the NLRB's Order, offer Frank Cunningham full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job.

WE WILL make Frank Cunningham whole with interest for any loss of earnings and other benefits he suffered as a result of his April 15, 2005, termination.

WE WILL, within 14 days of the NLRB's order, remove from our files any reference to, Frank Cunningham's April 15, 2005, termination and, within 3 days thereafter, **WE WILL** notify him in writing that this has been done and that his discharge will not be used against him in any way.

BASIN ASPHALT CO., INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

915 2nd Avenue, Federal Building, Room 2948, Seattle, WA 98174-1078
(206) 220-6300, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (206) 220-6284.